Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

WT 99-263

In the matter of	)	
	)	
Southwestern Bell Mobile Systems, Inc.	)	
	)	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-minute Increments	)	File No. 97-31

To: The Commission

SUPPLEMENT TO RESPONSE TO COMMENTS

Commentor is Plaintiffs' counsel in a class action styled JAMES J. WHITE, PERRY KRANIAS, RALPH DELUISE and WALL STREET CONNECTIONS, INC. vs. GTE CORPORATION; GTE WIRELESS INCORPORATED f/k/a GTE MOBILNET INCORPORATED; GTE WIRELESS OF THE SOUTH INCORPORATED f/k/a GTE MOBILNET OF THE SOUTH INCORPORATED; GTE MOBILNET OF TAMPA INCORPORATED; GTE WIRELESS OF HOUSTON INCORPORATED; GTE MOBILNET OF CLEVELAND INCORPORATED; and GTE MOBILNET OF THE SOUTHWEST INCORPORATED, (collectively "GTE"), brought in the United States District Court for the Middle District of Florida, Case No.97-1859-CIV-T-26C, ("GTE Class Action"). In this case, the United States District Court for the Middle District of Florida has held that challenging the "next-minute" billing practice is not a challenge to the reasonableness of the rates but rather a challenge to the reasonableness of the billing practice itself. (A complete copy of the Court's Order is attached hereto as Exhibit "A").

STAACK & SIMMS, P.A., Attorneys
121 North Osceola Avenue, 2nd Floor, Clearwater, FL 33755

Respectfully submitted,

Richard F. Meyers

Richard F. Meyers, Esquire
STAACK & SIMMS, P.A.
121 N. Osceola Avenue
Second Floor
Clearwater, FL 33755
(813) 441-2635
Attorney for GTE Class Action Plaintiffs
FBN#0893315

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES J. WHITE, PERRY KRANIAS, and RALPH DELUISE,

Representative Plaintiffs,

v. CASE NO: 97-1859-CIV-T-26C

GTE CORPORATION; GTE WIRELESS INCORPORATED, f/k/a GTE MOBILNET INCORPORATED; GTE WIRELESS OF THE SOUTH INCORPORATED, f/k/a GTE MOBILNET OF TAMPA INCORPORATED and GTE MOBILNET OF THE SOUTH INCORPORATED; GTE WIRELESS OF HOUSTON INCORPORATED; GTE MOBILNET OF CLEVELAND INCORPORATED; and GTE MOBILNET OF THE SOUTHWEST INCORPORATED,

Defendants.
_____/

ORDER

Before the Court are the Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by GTE Wireless Incorporated and GTE Wireless of the South Incorporated and the supporting memorandum (Dkts. 72 and 73), the Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by Defendants GTE Corporation, GTE Wireless of Houston Incorporated, GTE Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated and the supporting memorandum (Dkts. 74

EXHIBIT A

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and 75), Plaintiffs' Responses (Dkts. 76 and 85), the Reply to Plaintiffs' Response to Defendants GTE Wireless Incorporated's and GTE Wireless of the South Incorporated's Dispositive Motion to Dismiss (Dkt. 86), the Memorandum Correcting Mistake Contained in Reply (Dkt. 87), Plaintiffs' Notices of Filing Supplemental Case Law (Dkts. 88 and 93). After careful consideration of the motions and the file, the Court is of the opinion that the motion to dismiss for failure to allege a claim for relief should be granted as to count II and denied as to counts I, III, and IV. The motion to dismiss for lack of personal jurisdiction should be denied.

Allegations of the Third Amended Complaint

Plaintiffs represent a purported class of individuals of Florida residents who were cellular service customers of Defendants (GTE).[1] (Dkt. 70 at para. 25). GTE allegedly concealed and failed to disclose its practices of charging on a "rounded up" basis. (Dkt. 70 at para. 26). "Rounding up" means that each call is billed in whole minute increments, with any fraction of a minute being billed as a whole minute. (Dkt. 70 at para. 14). Each call begins at the time the "send" button is pushed, regardless of whether a connection is made. (Dkt. 70 at para. 14). GTE charged Plaintiffs on a "rounded up" basis and Plaintiffs paid GTE the amount billed. The monthly bills do not disclose or explain the

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[1] The Court will refer to all defendants as GTE. The part of this order addressing personal jurisdiction refers only to the non-resident defendants.

practice of "rounding up." (Dkt. 70 at para. 19). The contracts between GTE and Plaintiffs, both oral and written, did not provide "an adequate description or disclosure . . . as to GTE's Rounding Up practices." (Dkt. 70 at paras. 20 and 22). GTE induced Plaintiffs to enter into the contracts "with advertisements and materials, including, among other things, promises of free air time." (Dkt. 70 at para. 18).

In the four-count complaint, count I alleges a private action pursuant to 47 U.S.C. section 207 for a violation of the Communications Act of 1934, 47 U.S.C. section 201(b). (Dkt. 70 at para. 37). Plaintiffs assert that "[t]he practice of charging for all air time on a Rounded Up basis is unjust and unreasonable, and therefore unlawful, under the provisions of 47 U.S.C. section 201(b)." (Dkt. 70 at para. 38). Count II seeks an injunction to restrain GTE from "rounding up." (Dkt. 70 at paras. 40-44).

Count III seeks damages for breach of contract. (Dkt. 70 at paras. 45-50). GTE allegedly breached the oral and written contracts "by charging and collecting more money for cellular phone services than Plaintiffs and class members have agreed to pay." (Dkt. 70 at para. 48). Count IV constitutes a state law claim based on a violation of section 501.201, et seq., Florida Statutes, which is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). (Dkt. 70 at paras. 51-57). Plaintiffs allege that "charging for all air time on a Rounded Up basis, without adequately disclosing such practices," amounts to unfair competition.

Plaintiffs sued a total of seven defendants. Of those seven, two are corporations

authorized to conduct business in Florida, one of which is a Florida corporation and the other a Delaware corporation. (Dkt. 70 at paras. 6 and 7). Four of the remaining five defendants are either Delaware or Texas corporations that provide cellular service throughout the United States "either directly or indirectly through its subsidiaries and affiliates." (Dkt. 70 at paras. 5, 8, 9, and 10). The last defendant is GTE Corporation, a New York corporation that not only provides cellular service throughout the United States "either directly or indirectly through its subsidiaries and affiliates," but is "the parent corporation of or is otherwise affiliated with all other Defendants." (Dkt. 70 at para. 4).

Argument

Defendants characterize Plaintiffs' claims as ones seeking a retroactive rate reduction. Defendants argue that the two state law claims (counts III and IV) are preempted expressly and completely as improper rate regulation in violation of the Federal Communications Act (FCA). As to the state law claim of breach of contract, Defendants contend that the contracts obligate Plaintiffs to pay per minute rates.

Defendants argue that the claim based on the FCA (count I) should fail because per minute billing does not constitute a per se violation and Plaintiffs have not suffered any direct injury from the billing process. As to the claim titled "injunction" (count II), no such federal claim exists, and even if it did, Plaintiffs have an adequate remedy at law.

Plaintiffs respond that this purported class action challenges Defendants'

"fraudulent and deceptive promotional and contract practices, not Defendants' rates." (Dkt. 76 at 11). Plaintiffs state that they are attacking the deceptive promotional, advertising, contracting and billing practices of Defendants. They suffered injury by not receiving the full amount of allocated cellular air time elected under a contract and by being overcharged for air time used in excess of the flat-rate amount allocated under the service plan chosen.

Violation of 47 U.S.C. § 201(b)

Plaintiffs state that one of the issues in this action is whether Defendants violated 47 U.S.C. section 201(b) by "deceptively promoting, contracting and billing Plaintiffs by rounding up calls." (Dkt. 76 at 13). The complaint specifically alleges that the practice of charging for all air time by rounding up is unjust and unreasonable under section 201(b). (Dkt. 70 at para. 38). Thus, at least in count I, Plaintiffs do not appear to be challenging the reasonableness of the rates or the failure to disclose a particular billing practice, but rather are challenging the reasonableness of the billing practice itself.

Most of the cases addressing the viability of actions based on the practice of rounding up may be divided into three categories: 1) federal cases deciding whether the FCA completely preempts state law claims for purposes of removal jurisdiction,[2] 2) state

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[2] See, e.g., Marcus v. AT & T Corp., 138 F.3d 46 (2d Cir. 1998); Sanderson, Thompson, Ratledge & Zinny v. AWACS, Inc., 958 F.Supp. 947 (D.Del. 1997); Bennett v. Alltel Mobile Communications of Alabama, Inc., No. Civ.A. 96-D-232-N, 1996 WL

cases deciding whether a cause of action exists for breach of contract, fraud, violations of state consumer acts for fraud and unfair trade practices, and various other state law claims,[3] and federal cases addressing preemption in a non-removal setting.[4] Of the cases addressing removal issues, the courts have found that the complete preemption doctrine, a concept associated with removal jurisdiction, does not extend to the FCA. In so ruling, some courts in dicta wrote that when a plaintiff challenges billing practices as unreasonable, as opposed to challenging improper billing based on deceptive advertising, a claim for relief for damages under section 207 of the FCA is available.[5]

1054301 (M.D.Ala. May 14, 1996); DeCastro v. AWACS, Inc., 935 F.Supp. 541 (D.N.J. 1996); In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193 (E.D.Penn. 1996).

[3] See, e.g., Tenore v. AT & T Wireless Services, 962 P.2d 104 (Wash. 1998), cert. denied, No. 98-947, 1999 U.S. LEXIS 1507 (U.S. Feb. 22, 1999).

[4] See In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633 (6th Cir. 1987) (primary jurisdiction doctrine required referral of claim regarding reasonableness of defendant's practices to Federal Communications Commission, but state law claims for fraud and deceit based on failure to notify customers of practice of charging for uncompleted calls not preempted by FCA); Stein v. Sprint Corp., 22 F.Supp. 1210 (D.Kan. 1998) (filed-rate doctrine barred claims for fraud and breach of contract and for damages or injunction requiring certain rate be charged, but did not preempt state law claims under state statutes for injunction relating to deceptive advertising).

[5] See Sanderson, Thompson, Ratledge & Zinny v. AWACS, Inc., 958 F.Supp. 947, 955-56 (D.Del. 1997) (claims for statutory fraud and breach of contract did not challenge reasonableness of billing practice or rate and therefore did not fall within the scope of civil enforcement of FCA); In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193, 1203 (E.D.Penn. 1996) (true gravamen of complaint was challenge to rates and billing practices and as such action under section 207 would have been available); DeCastro v. AWACS, Inc., 935 F.Supp. 541, 550 (D.N.J. 1996) (section 207 does not provide federal cause of action for violations of a knowing failure to

After carefully considering all the cases and pertinent provisions of the FCA, this Court concludes that the FCA permits under section 207 a claim for damages for the reasonableness of a particular billing practice, such as the practice of rounding up.[6] However, this Court must invoke the doctrine of primary jurisdiction and refer the issues raised in this count to the Federal Communications Commission. See In re Long Distance Telecommunications Litigation, 831 F.2d at 629-630 (primary jurisdiction applies where claim is originally cognizable in courts but regulatory scheme requires enforcement of the claim by administrative body, quoting United States v. Western Pacific R.R., 352 U.S. 59, 63-65 (1956)).

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disclose a particular billing practice); Weinberg v. Sprint Corp., 165 F.R.D. 431, 438-39 (D.N.J. 1996) (no removal jurisdiction where plaintiff's state law claims related to Sprint's advertising practices rather than the billing practice itself); Marcus v. AT & T Corp., 938 F.Supp. 1158, 1167-69 (S.D.N.Y. 1996) (common law claims arose under federal law and removal was proper).

[6] No mention of the "filed rate" or "filed tariff" doctrine has been made. If this case were governed by the filed rate doctrine, count I would be barred. See Marcus, 938 F.Supp. at 1169-70. This Court assumes that it is inapplicable because Defendants are characterized as commercial mobile radio service providers, which are specifically exempted from tariff filing requirements by the FCA. See Tenore v. AT & T Wireless Services, 962 P.2d 104, 109-10 (Wash. 1998) (citing 47 C.F.R. sections 20.15(a), (c), 20.3, and 20.9(a)). In any event, whether competition in the area of cellular telephone service necessarily makes any rate per se reasonable should be decided by the Federal Communications Commission under the doctrine of primary jurisdiction. See In re Long Distance Telecommunications Litigation, 831 F.2d 627, 631 (6th Cir. 1987) (claims based on 47 U.S.C. 201(b) are within primary jurisdiction of FCC); Kiefer v. Paging Network, Inc., 50 F.Supp. 681, 682 (E.D.Mich. 1999) (reasonableness of standardized late payment charge should be referred to FCC).

Florida Deceptive and Unfair Trade Practices Act

Plaintiffs challenge the failure to disclose the billing practice of rounding up as deceptive under the FDUTPA. Applying simple preemption principles, as opposed to the complete preemption doctrine required in removal cases, the courts have found that the FCA does not preempt state law claims attacking the failure to disclose the method by which a customer's bill is determined. Because this claim appears to be one of those which are not preempted by the FCA, count IV will be permitted.

Breach of Contract

Essentially, Defendants argue that because Plaintiffs agreed to per minute billing, Plaintiffs cannot state a cause of action for breach of contract. Plaintiffs respond that although some of the customer contracts contain the term "per minute billing," that term is not defined. On balance, the Court finds that count III alleges sufficient facts at this stage to state a cause of action for breach of contract.

Claim for Injunction

The Court agrees with Defendants that Plaintiffs have failed to allege a cognizable claim for injunctive relief. Plaintiffs have not persuaded this Court that a separate and independent federal claim for injunctive relief exists in this case. Plaintiffs state that they "are not specifically seeking an injunction on a federal common law theory" but that

"such relief is commonly recognized" by the state courts of Florida. (Dkt. 76 at 11). To the extent Plaintiffs seek injunctive relief pursuant to FDUTPA, they must do so in count IV.

Personal Jurisdiction over Non-resident Defendants

Plaintiffs counter the Non-resident Defendants' arguments with the fact that the contract attached to the complaint specifically defines them as parties to the contract. The customer service agreement attached as Exhibit B to the Third Amended Complaint provides that the agreement "is made by GTE Mobilnet Service Corporation, on behalf of its affiliates and subsidiaries." The complaint alleges that the Non-resident Defendants are either the subsidiaries or affiliates of GTE Mobilnet Service Corporation. (Dkt. 70 at para. 11). Defendants' counter affidavits have not shown otherwise. Consequently, this Court finds that personal jurisdiction exists over the Non-Resident Defendants.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. The Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by GTE Wireless Incorporated and GTE Wireless of the South Incorporated (Dkt. 72) is **GRANTED** in part and **DENIED** in part. The motion is granted as to count II and denied as to counts I, III, and IV.

2. The Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by Defendants GTE Corporation, GTE Wireless of Houston Incorporated, GTE

Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated (Dkt. 74) is **DENIED.**

3. Under the doctrine of primary jurisdiction, the Court hereby **REFERS** count I to the Federal Communications Commission (FCC) for a decision. Plaintiffs are **directed** to file a petition for a determination of the issues contained in count I with the FCC. The Clerk of the Court shall certify a copy of the entire record in this case to be transmitted to the FCC.

4. The remaining claims are hereby **STAYED** pending a determination of the reasonableness of Defendants' billing practice of rounding up. The parties shall advise this Court of the FCC's ruling or other determination immediately.

5. All other pending motions including the motion for class certification (Dkt. 50) are **DENIED** with leave to refile after the FCC has rendered its decision.

6. The Clerk is directed to **administratively close** this case.

DONE AND ORDERED at Tampa, Florida, on this 21 day of October, 1999.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record